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No. 880

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILLIAM LEV AND BENJAMIN DANIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 23; R. 265)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1960 (R. 287). The petition for a writ of certiorari was filed on April 22, 1960. The

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[1] "R." refers to the printed appendix of the United States in the court below. "Tr." refers to the typewritten transcript of testimony at the trial.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, after defense counsel on cross-examination used selected parts of the pretrial statement of a government witness in an attempt at impeachment, it was error for the trial court to permit government counsel, on redirect examination, to read portions of the same statement amplifying these selected parts.

2. Whether the trial court committed error in not ruling as a matter of law that petitioner Danis had withdrawn from the conspiracy prior to its termination.

STATEMENT

Petitioners, United States customs inspectors, were convicted, after a jury trial, in the United States District Court for the Southern District of New York, of a conspiracy to defraud the United States by smuggling merchandise into the country in consideration for money and gifts. Petitioner Lev was also convicted on 21 substantive counts of bribery or smuggling; petitioner Danis on 4 substantive counts of bribery or smuggling[2] (R. 6). Each of the petitioners was sentenced to 3 years' imprisonment and a $2500 fine on the conspiracy count, and 2 years' imprisonment on each of the substantive counts, the sentences of imprisonment to run concurrently (R. 8-9).

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[2] See 18 U.S.C. 213, 545, and 371.

1. The evidence as to the conspiracy and substantive offenses.

The government's case was established in large part by the testimony of Battaglia and Guarna, two salesmen and importers of higher-priced neckwear and similar apparel from Italy, who were named in the indictment as co-conspirators and who had prior to trial entered pleas of guilty (R. 4).

Their testimony showed that, in January 1954, petitioner Danis, a customs inspector, visited the office of Battaglia where he accepted a gift of neckwear and $20 for having cleared the importer quickly through customs at a ship dock a few days previously. At this time, Danis suggested that Battaglia and his partner, Guarna, might bring anything into the country without payment of duty if they shared the savings with him (R. 40-41, 114-116). A few days later, Danis and his fellow inspector Lev returned to the office to repeat the proposition. Danis called repeatedly thereafter to inquire about a decision (R. 41-42, 116-119).

The following year, the importers contacted the inspectors about their proposition. In January 1955, Danis summarily cleared Battaglia's baggage of samples through customs without inspection or collection of duties. In the office of the importers a few days later, Danis and Lev were given shirts and Danis was given neckties and $100 in cash (R. 44-49; 120-123). Thereafter, on eleven separate occasions, from September 1955 to October 1957, merchandise of the importers ranging in value from $5000 to $28,000 was cleared at a landing pier with-

out declaration, inspection, or payment of duty. This was done by Lev or some other inspector acting for him (see Tr. 129, 134, 135, 153, 160, 164, 170, 191, 192, 198, 771-990, 1671, 1681). On each occasion, Lev was contacted in advance and after each smuggling operation the importers gave to him, and to some of the other inspectors acting for him, money ranging from $50 to $600. Lev also received a wristwatch and gold bracelet for his wife.

2. Danis' purported withdrawal from the conspiracy.

Danis, in May 1955, was transferred by the Customs Service to a district embracing Idlewild Airport. Prior to his transfer, he advised the importers of this fact, told them they could contact Lev for anything wanted at the dock, and told them to call him at the airport if he could be of help there. He said they could "bring everything to the airport" (R. 49, 124).

In December 1955, Danis, in compliance with a request from Guarna, arranged for a fellow inspector to clear the arrival at the airport of a manufacturer dealing with the importers. Although the scheduled arrival did not take place due to bad weather, shortly thereafter Danis went to the importers' office where he received two neckties. A month or two later, in January 1956, he again received two or three neckties at the office (R. 133-136, 171-172).

During trial, counsel for the petitioner Danis, referring to the fact that Danis had been transferred in May 1955, argued that, even if a conspiracy existed, the transfer amounted to a withdrawal by Danis; he thus objected to the introduction of evidence of activ-

ıties subsequent to that date (Tr. 113-129). The court overruled the objection, holding that this was a matter going to the weight and sufficiency of the evidence (Tr. 130).

The court instructed at length on this matter of membership in the conspiracy. It told the jury that, once it had been determined beyond a reasonable doubt that a defendant was a member of a conspiracy, he was presumed to continue as a conspirator until he disassociated himself from the conspiracy by means of an affirmative act of withdrawal (R. 191). Briefly noting the evidence, the court said (R. 192):

> If you find that Danis joined the conspiracy charged in Count 27 and that any one or more of the overt acts charged in the indictment was committed while Danis was a member of the conspiracy, his later withdrawal therefrom, if such in fact occurred, would not mean that he thereby became not guilty of participating in the conspiracy in the first place. In such circumstances, the effect of a withdrawal would be to exclude from your consideration as against Danis all evidence of acts and declarations by other co-conspirators after the date of Danis' withdrawal.
>
> Thus, if you find that Danis did disassociate himself from the conspiracy by means of an affirmative act of withdrawal, you should not consider as against him any acts or declarations of any other persons after that date. In such event, however, you should still consider whether or not Danis should be found guilty on the conspiracy count based upon his own acts and declarations prior to the withdrawal.

3. The pre-trial statements of the witness Battaglia.

During cross-examination of the witness Battaglia, counsel for petitioners attempted to impeach his credibility by reading selected portions of transcripts of two statements he had made to Customs agents in October 1957 (Exhibit 12 for identification) and in November 1957 (Exhibit 13 for identification) which had been turned over to defense counsel pursuant to 18 U.S.C. 3500.

Among the more than thirty-eight questions and answers read from both statements by counsel for petitioner Lev were several, from Exhibit 13 for identification, concerning events that took place during and after Battaglia was cleared at a port of entry in December 1956 by Inspector Rosenberg (R. 96-100). Among the more than thirteen questions and answers read from both statements by counsel for petitioner Danis was a question, from Exhibit 13 for identification, as to why Lev, rather than another inspector (Rider), was given a payment after a December 1955 entry (R. 104).

On redirect, government counsel, relying on the doctrine of completeness (R. 109), over objection read and inquired as to the accuracy of three questions and answers from Exhibit 13 for identification, regarding the December 1955 entry—specifically relating to who paid Lev, how much, and what reason was offered as to why Lev and Rider were paid separately (R. 106-108). From Exhibit 12 for identification he read four questions and answers relating to the circumstances at the port of entry upon the

December 1956 arrival and clearance by Inspector Rosenberg (R. 107-109).

Defense counsel's motion for a mistrial on the grounds that this was improper redirect examination was denied (R. 111).

ARGUMENT

Petitioners' contentions, rejected by the court below, and repeated in this Court, present no questions worthy of further review.

1. At the trial, petitioners chose to use pre-trial statements of the witness Battaglia in an attempt to impeach his testimony on cross-examination. There is no merit in their contention that government counsel was improperly permitted to use, on redirect examination, portions of the same statements, not in evidence, which were relevant to the matters alluded to by defense counsel on cross-examination. As the court below held, the trial court was correct in permitting the government to round out and complete the quotations on which the defense had based its questions.

This case falls within the doctrine of "verbal completeness"—a rule designed to prevent the limitation of evidence which might confuse a jury. The rule is an exception to the prohibition on the admission of prior consistent statements (see *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3); 4 Wigmore, *Evidence* (3d ed. 1940), Section 1126). Where selected portions of a statement made by a witness are used on cross-examination to impeach, it is within the discretion of the trial judge to permit the introduction of the entire

statement, or at least such remaining portions as are relevant, for the purpose of meeting the force of the impeachment. *Short* v. *United States*, 271 F. 2d 73 (C.A. 9); *United States* v. *Apuzzo*, 245 F. 2d 416 (C.A. 2), certiorari denied, 355 U.S. 831; *Affronti* v. *United States*, 145 F. 2d 3 (C.A. 8); *United States* v. *Katz*, 78 F. Supp. 435 (M.D. Pa.); 7 Wigmore, *Evidence* (3d ed. 1940), Sections 2113, 2115.

In this case the rule plainly operated to clarify the testimony. Thus, when counsel for petitioner Danis read on cross-examination an isolated inquiry from the witness' pre-trial statement as to why, after Battaglia's entry of December 1955, money had been given to Inspector Lev for himself, rather than for himself and Inspector Rider (R. 104, 250), it was proper for government counsel to read the three questions and answers in the statement immediately preceding the particular inquiry chosen by the defense counsel—material which dealt with the identical subject matter as to who paid Lev, how much, and the reasons for separate payments to Lev and Rider (R. 106-107, 249). And, after counsel for petitioner Lev read questions and answers relating to conversations had with, or payments made to, Inspector Rosenberg or Inspector Lev after an entry in December 1956 (R. 96-100, 259), it was also entirely proper for government counsel to bring out the complete picture presented by Battaglia's statement as to the circumstances of that arrival (R. 107, 238).[3]

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[3] It is of no significance that, in this one instance, defense counsel's quotations relative to the 1956 arrival were taken

2. There is no merit to the argument that the trial court should have ruled as a matter of law that petitioner Danis withdrew from the conspiracy at the time of his transfer to Idlewild Airport. The court asked for any evidence that would throw light on the matter (Tr. 129-130). Not only was there no evidence forthcoming to show an unequivocal act of withdrawal by Danis but there was affirmative evidence that he professed willingness to continue smuggling operations at the airport and that he continued to accept gifts from the importers. See the Statement, *supra*, pp. 4-5.

The court properly left this factual decision to the jury with detailed and comprehensive instructions to the effect that, if it found an affirmative act of withdrawal by Danis, it could not consider against him the acts and declarations of any other person after that date.

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from Exhibit 13 for identification while government counsel's were read from Exhibit 12 for identification. Both exhibits were used by defense counsel. Exhibit 13 is a "supplemental statement" designed "to go into some details on some of the points" covered in Exhibit 12 (R. 243). For the purposes of the doctrine of completeness, Exhibit 13 for identification must be considered as part of the same document as Exhibit 12 for identification. See 7 Wigmore, *Evidence* (3d ed. 1940). Section 2120.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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